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Supreme Court, U.S.
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No. 02-

IN THE
SUPREME COURT OF THE UNITED STATES

In Re:
KENNETH S. ONAPOLIS
MELODY LYNN ONAPOLIS,

Petitioners

PETITION FOR A WRIT OF HABEAS CORPUS UNDER THE ORIGINAL JURISDICTION OF THE COURT

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31 pp

QUESTION PRESENTED

Whether the United States Attorney General, through its agents of the United States Marshal Service and the Federal Bureau of Prisons, may abduct, detain, and incarcerate a federal supervised release violator and a State of West Virginia appellate bond violator, when those violators are outside the territorial and jurisdictional limits of the United States and are traveling under the identification, invitation, and protection of a sovereign nation's diplomatic passport, with or without the prior approval of the Attorney General or the Secretary of State?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are the Petitioners, the United States of America by and through its Attorney General, the Commonwealth of Virginia, and the State of Ohio.

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PETITION FOR A WRIT OF HABEAS CORPUS

Petitioners, Kenneth S. Onapolis and Melody Lynn Onapolis, husband and wife, respectfully petition for a Writ of Habeas Corpus for release from custody and detention pursuant to 28 U.S.C. §2241.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

Article II, Section 2 of the United States Constitution:

> In all cases affecting ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."

18 U.S.C. §3184:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or

> magistrate judge, to the end that the evidence of criminality may be heard and considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, or under section 3181(b), he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

22 U.S.C. § 254d:

> Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under section 254b or 254c of this title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or suggestion by or on behalf of the individual, or as otherwise permitted by law or applicable rules of procedure.

JURISDICTION

This Court has original jurisdiction over the Petitioners and their claims pursuant to 28 U.S.C. §1251(b)(1) and 28 U.S.C. §2241, and Article III, Section 2 of the United States Constitution. This Petition for the extraordinary writ of habeas corpus is brought before this Court, rather than a lower court, due to the extraordinary issues and convergence of due process, international law, and public policy. Coupled with the status of the Petitioners as foreign nationals and holders of diplomatic credentials, the illegality of the Petitioners' current detention implicates constitutional interests at a level best addressed by the highest Court.

STATEMENT

This case presents a fundamental question of international comity on one hand and due process on another. This Court has not, to date, issued any opinion nor even entertained a case in which an opinion was sought on the right of those shielded by diplomatic passports to be free from abduction by Federal agents, detention, and incarceration when traveling outside the jurisdiction of the United States. Perhaps the uniqueness of the issue has also escaped the several circuits of our Courts of Appeal, for few have engaged the topic of diplomatic immunity at all and none have dealt with the issue of diplomatic immunity from further incarceration due to a supervised release violation.

The core facts are that the Petitioners were domiciled in the United States when both Petitioners ran afoul of the law. Mr. Onapolis is a dual citizen of both the United States and Greece, as well as holding diplomatic credentials from Cyprus.

Mrs. Onapolis is a United States citizen. Nikos Onapolis, not a petitioner herein but a material individual to the events that transpired, maintains dual citizenship.

In August, 1997, Kenneth Onapolis was convicted of providing false information in a passport application, and mail and bank fraud. He was sentenced to serve 37 months of incarceration with the Federal Bureau of Prisons, together with a supervised release term of 3 years. Even though Mr. Onapolis has dual Greek-United States citizenship and carries a diplomatic passport issued by the country of Cyprus, he was tried and convicted as the Embassy of Cyprus issued a limited waiver of diplomatic immunity for trial only at the request of the State Department.

In May, 2000, Melody Lynn Onapolis was convicted of violating a West Virginia state statute against embezzlement. She was convicted and sentenced to serve a term of 1 to 10 years of incarceration on each of three counts, with each count to be served consecutively, with the West Virginia Department of Corrections. She filed a timely notice of appeal and was released on an appeal bond.

In May, 2000, Mr. Onapolis was released from incarceration and placed on a three year term of supervised release. Concurrently, Mrs. Onapolis was on her appellate bond. Shortly thereafter, the Petitioners, in violation of their release conditions, left the United States with their eight year old son for Greece. The United States sought extradition of the Petitioners from Greece but were declined by the Greek government.

Upon arriving in Greece, Mr. Onapolis commenced his duties for Greece and Cyprus under his Cypriote diplomatic credentials. During the course of these duties, Mr. Onapolis,

his wife and young child, traveled to the Republic of Vanuatu (formerly known as the New Hebrides Islands), a United States recognized sovereign located north of Australia. While in the Republic of Vanuatu, the United States Marshals located the Petitioners and sought their extradition back to the United States. According to newspaper accounts, as part of the extradition request, agents of the United States Government represented to the highest court of the nation, the Vanuatu Supreme Court, that the Petitioners were material witnesses in a major organized crime trial in Philadelphia, Pennsylvania.

While waiting for the Vanuatu Supreme Court to address the request, the U.S. Marshals stayed busy. The Government agents sought to have Mr. Onapolis charged with a felony in Vanuatu, seeking to have him deported. The Supreme Court of Vanuatu, though, denied the extradition and the deportation requests. Further, United States Marshals arranged for the arrest and detention of Petitioner's several times in less than a week. Finally, the Supreme Court of Vanuatu ruled that the Petitioners were to be released from custody, and were entitled to due process of law. The Supreme Court of Vanuatu scheduled a hearing on the matters presented by the United States Marshals for the following week.

Immediately after the Vanuatu Supreme Court denied extradition and deportation in favor of due process, agents of the United States Government, acting either under orders from superiors or on their own, kidnaped the Petitioners and their young son in the middle of the night from Petitioners' hotel room. The first leg of this abduction was through Australia. When the U.S. Marshals arrived in Australia with their "prisoners," the Petitioners declared that they were protected by diplomatic immunity and requested to speak with embassy personnel from either Greece or Cyprus. The U.S. Marshals refused to allow any contact between the abductees and their

national embassies, and continued the illicit transportation of these three people to California.[1] Upon arrival in California, Nikos, the Petitioners' young son, was turned over to his maternal grandparents over the Petitioners' objections, and the Petitioners were respectively transported to Ohio and West Virginia.

Currently, Mr. Onapolis is in the custody of the State of Ohio Department of Corrections for and on behalf of the Federal Bureau of Prisons, awaiting his sentence on a supervised release violation and a new charge of issuing a bad check. Mrs. Onapolis is in the custody of the State of West Virginia on her original conviction, having lost her direct appeal. See, State of West Virginia v. Onapolis, 208 W. Va. 521, 541 S.E.2d 611 (W. Va. 2000) Nikos Onapolis is, against the wishes and desires of his parents, under the care and custody of his maternal grandparents, still suffering from the trauma, indignity, and stress of being abducted by agents of the United States Government.

REASONS FOR GRANTING THE WRIT

The framers of the Constitution sought to memorialize in that document the key concept of the new Republic, that of

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[1]Although ratified in 1969 and invoked frequently by the United States State Department on behalf of Americans arrested or detained abroad, the Vienna Convention on Consular Relations was ignored by the U.S. Marshals. Specifically, the protections of Article 36 went unheeded after the abduction. This Article provides in part that upon the request of the arrestee, the officials of the country holding the prisoner are required to inform the consulate of the arrest of its national and forward to the consulate, without delay, any communication from the arrestee.

the *limited* powers of the national government. *See*, United States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000); *also see*, Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985) ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'") (Powell, J., dissenting). See, *e.g.*, Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 176, 2 L. Ed. 60 (1803) (Marshall, C. J.) (Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint). It is contrary to our system of fundamental liberties for citizens of this great nation to be abducted from their bedrooms, stolen away in the night, to stand trial for non-violent wrongdoing. It is contrary to due process; it is abhorrent to the orderly manner of executing arrest warrants; and it is simply a denigration of our system of law.

In addition, the leaders of the United States, both presidential and congressional[2], have long sought the United States to be a leader among the nations of the world. *See*, U.S. Department of Defense Defense Issues, Volume 13, Number 22, *Remarks of Secretary of Defense William S. Cohen*, March 20, 1998 ("... we want to shape the security environment, to encourage more democracy in more nations, [and] more stability in more regions...To do that, we must remain engaged in world affairs.) As former President Jimmy Carter remarked in a private magazine article for Claretian Publications in 1997,

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[2]No disrespect to this Court is intended as one of the three pillars of Federal leadership in our national government.

> A true superpower [such as the United States] would be known for raising high the banner of human rights, unequivocally and persistently. It would be the world champion of freedom and democracy...There is no way to quantify the hope and the admiration that exist in the hearts and minds of people as they look toward the United States. You only have to note how many of them want to move here to see how much we are admired for what we have achieved.

It is contrary to our notions of superpower responsibility and international leadership for the Federal government to ignore the respect and dignities of international accords and diplomatic protections.

Section 2241 of Title 28 codifies the common law extraordinary writ of habeas corpus so closely cherished by our Framers, this Court, and the American people. Bowen v. Johnston, 306 U.S. 19, 26 (1939)("We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired'") To reach its protective goal, the statute provides that writs of habeas corpus may be granted by this Supreme Court, any justice hereof, any District Court, and any circuit judge, within their respective jurisdictions. Jones v Cunningham, 371 U.S. 236, 9 L. Ed. 2d 285, 83 S. Ct. 373 (1963) This Court in the Jones case also made it clear that writs of habeas corpus can reach behind prison walls and iron bars, but that it is not a static, narrow, nor formalistic remedy; its scope also includes protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. Finally, it is well established by this Court that since habeas corpus is an extraordinary remedy whose operation is to large extent uninhibited by traditional rules of federalism, its use has been focused on cases of special urgency, leaving more conventional remedies for cases in which restraints on liberty

are neither severe nor immediate. Hensley v Municipal Court, San Jose-Milpitas Judicial Dist, 411 U.S. 345, 36 L. Ed. 2d 294, 93 S. Ct. 1571 (1973). Petitioners maintain that this instant case is such an extraordinary case of special urgency.

In the instant matter, any reasonable person's conscience would and should be shocked by the actions of agents of the Federal Government. No statutory nor judicial permission exists for a Federal supervised release violator and a state release violator to be abducted at gunpoint in the middle of the night from their hotel bedroom by government agents in violation of the laws of a foreign sovereign nation, only to be whisked away and returned to the jurisdiction of the Federal judiciary. In fact, quite the contrary exists.

To support the notions of due process of the Federal constitution, Congress had adopted extradition processes under which violators of United States law who are physically absent from the territorial jurisdiction of the United States can be compelled to be returned from another nation. This process works under existing extradition treaties with the host nation. In fact, the United States has maintained extradition treaties with Greece and Cyprus since 1931. However, in order to effectuate an extradition under a treaty, the Government must first seek approval from the United States Attorney General, and obtain a certificate of extraditability, all as outlined in the respective treaties for extradition Such a process was not attempted in this case. One of the reasons for its absence may lie in the fact that the United States and the Republic of Vanuatu do not have any such treaty.

The instant case, then, raises two questions which, if either is answered in the negative, require the issuance of the requested writ. May agents of the Federal government forcibly abduct, detain, and incarcerate a person wanted on criminal wrongdoing (such as a supervised release violation or other

state release violations) when that violator is outside the territorial limits of the United States in a nation where no extradition treaty exists? And may such a forcible abduction be committed if the violator is traveling under a diplomatic passport from a third independent country?

Under the *Ker-Frisbie* doctrine developed by this Court out of the cases of Ker v. Illinois, 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 421, (1886) and Frisbie v. Collins, 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952), it has been established that interstate removals for the purpose of being tried in a criminal proceeding was not violative of the due process clause of the Constitution. Specifically, Frisbie affirmed the Ker holding that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." Due process of law, this Court held in both those cases, is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.

However, for years these two cases have been the mainstay of a nineteenth century doctrine of the Republic that the government's power to prosecute a defendant is not impaired by the illegality of the method by which it acquires control over him. The first iteration of this doctrine by this Court was almost 117 years ago in Ker. While residing in Peru, Ker was indicted by an Illinois grand jury for larceny and embezzlement. At the request of the Governor of Illinois the President, invoking the then-current treaty of extradition between the United States and Peru, issued a warrant authorizing a Pinkerton agent to take custody of Ker from the authorities of Peru. The warrant, however, was never served, probably for the reason that by the time the agent arrived there, armed forces of Chile, then at war with Peru, were in control of

Lima. *See*, Ker v. Illinois Revisited, 47 Am. J. Int'l L. 678 (1953). Instead, Ker was forcibly abducted by the agent, placed aboard an American vessel and eventually taken to the United States, where he was tried and convicted in Illinois. The Supreme Court rejected Ker's argument that he was entitled by virtue of the treaty with Peru to a right of asylum there and held that the abduction of Ker did not violate the Due Process Clause of the Fourteenth Amendment (then less than 20 years old), which was construed as merely requiring that the party be regularly indicted and brought to trial "according to the forms and modes prescribed for such trials." The Court accordingly held that Ker might be tried by Illinois, regardless of the method by which it acquired control over him.

Sixty-six years later, this Court again faced the question in Frisbie, in a slightly different context. Collins, a Michigan state prisoner, petitioning for habeas corpus, alleged that he had been brought from Chicago, Illinois, to Michigan for trial only after he had been kidnaped, handcuffed and blackjacked in Chicago by Michigan police officers who had gone there to retrieve him. The prisoner claimed that his conviction in Michigan violated the Due Process Clause of the Fourteenth Amendment as well as the federal Kidnapping Act, 18 U.S.C. §1201, and was therefore a nullity. Rejecting the due process claim, this Court explained that "This Court has never departed from the rule announced in Ker v. Illinois, 119 U.S. 436, 444," 342 U.S. at 522.

Thus, under the so-called "*Ker-Frisbie*" rule, due process was limited to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction was obtained over the defendant. Jurisdiction gained through an indisputably illegal act might still be exercised, even though the effect could be to reward police brutality and lawlessness in

some cases.

Since Frisbie, this Court, in what has been described as a "constitutional revolution," *see* Griswold, *The Due Process Revolution and Confrontation*, 119 U. Pa. L. Rev. 711 (1971), has expanded the interpretation of "due process." No longer is due process limited to the guarantee of "fair" procedure at trial. In an effort to deter police misconduct, this Honorable Court has expanded the term to bar the government from realizing directly the fruits of it own deliberate and unnecessary lawlessness in bringing the accused to trial. *See*, United States v. Russell, 411 U.S. 423, 430-31, 36 L. Ed. 2d 366, 93 S. Ct. 1637 (1973); Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966); Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); Silverman v. United States, 365 U.S. 505, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961).

As the scope of due process has expanded, more and more criticism has been raised about the *Ker-Frisbie* rule. *See, e.g.*, Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 Calif. L. Rev. 579, 600 (1968); Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud*, 37 Minn. L. Rev. 91, 102, 107 (1953); Allen, *Due Process and State Criminal Procedures: Another Look*, 48 N.W.U.L. Rev. 16, 27-28 (1953); Supreme Court 1951 Term, 66 Harv. L. Rev. 89, 126-27 (1953); United States v. Edmons, 432 F.2d 577, 583 (2d Cir. 1970); Government of Virgin Islands v. Ortiz, 427 F.2d 1043, 1045 n. 2 (3d Cir. 1970).

In Rochin v. California, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952), decided at the same Term as Frisbie, this Court broadened its interpretation of due process to set aside for the first time a state court conviction resting on evidence obtained through police brutality. In that case, state police officers had frustrated a defendant's efforts to swallow two morphine capsules in his possession by taking the defendant, handcuffed, to a hospital where a doctor was induced to force "an emetic solution through a tube into [the defendant's] stomach against his will." When the solution produced vomiting the capsules were recovered and subsequently introduced at defendant's trial. Reversing the resulting conviction, Justice Frankfurter writing for a majority of the Court, said:

> Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those cannons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.
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> * * *
>
> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too categorically. This is conduct that shocks the conscience. . . .
>
> It has long since ceased to be true that due process of law is heedless of the means by which otherwise

> relevant and credible evidence is obtained. This was not true even before the series of recent cases enforcing the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a 'sense of justice.'" 342 U.S. 165, 172-73, 72 S. Ct. 205, 96 L. Ed. 183.

The underpinnings of Frisbie were further weakened by this Court's landmark decision in Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), where, overruling Wolf v. Colorado, 338 U.S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359 (1949), it interpreted the Due Process Clause of the Fourteenth Amendment to require that the Exclusionary Rule be applied in state prosecutions, just as it had for years been binding on the federal courts. As this Court has repeatedly made clear, the Exclusionary Rule has nothing to do with the fair determination of the guilt or innocence of the accused. It represents a judicially-created device designed to deter disregard for constitutional prohibitions and give substance to constitutional rights. Mapp v. Ohio, 367 U.S. 643, 646, 6 L. Ed. 2d 1081, 81 S. Ct. 1684.

In the words of Justice Holmes, to allow the government to benefit illegally from seized evidence, "reduces the Fourth Amendment to a form of words," Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920). The philosophy behind the rule and possible broader application of the basic principle underlying it was best described by Justice Brandeis from his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 72 L. Ed. 944, 48 S. Ct. 564 (1928):

> The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . .
>
> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution.

> Against that pernicious doctrine this court should resolutely set its face." 277 U.S. at 484-85.

With all due respect to this Court, society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law. Thus the Court's decisions in Rochin and Mapp unmistakably contradict its pronouncement in Frisbie that "due process of law is satisfied when one present in court is convicted of crime after being fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards."

Further, several circuit courts have cast doubt on the strength of the holding in Frisbie, notably due to its reliance on a case, Ker, that was decided before the Fourth Amendment as such was held applicable to the states, and thus rested only on general considerations of due process. See, Government of Virgin Islands v. Ortiz, 427 F.2d 1043, 1045 n. 2 (3d Cir. 1970)("We recognize that the validity of the *Frisbie* doctrine has been seriously questioned because it condones illegal police conduct."); United States v. Toscanino, 500 F.2d 267, 276 (2nd Cir. 1974)("we think a federal court's criminal process is abused or degraded where it is executed against a defendant who has been brought into the territory of the United States by the methods alleged here."); United States v. Cotten, 471 F.2d 744, 747-48 (9th Cir. 1973)(while adhering to the policy of Ker-Frisbie because it comes from a higher court, the Ninth Circuit noted that "[W]hile the court recognizes that the vitality of the doctrine we follow may be in doubt, and that federal officers might be held to a higher standard of conduct than their state counterparts, we will not strike it down.")

Thus, while current, centuries old doctrine might allow

Federal agents the right to abduct, detain, and ultimately incarcerate a defendant, based on the current decisions of this Court relative to due process, such a doctrine should not stand. Faced with a conflict between two concepts of due process, the one being the restricted version found in *Ker-Frisbie* and the other the expanded and enlightened interpretation expressed in more recent decisions of this Court, Petitioners request that this Court decide that to the extent that the two are in conflict, the *Ker-Frisbie* version must yield.[3]

Finally, today's world circumstances set a stage entirely different than in place when Ker was decided, and even Frisbie. The nation's public policy relative to how a country founded in law defines due process will either dim or brighten the beacon the United States shines internationally as the sole superpower.

Many of the multinational treaties in force today, of which the United States is a signatory, obligate "All Members" to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state. . . ." See, Department of State, Treaties in Force 402-03 (1973); United Nations Charter, Art. 2, para. 4; Article 17 of the Charter of the Organization of American States, Department of State,

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[3]This request additionally represents an extension of the well-recognized power of federal courts in the *civil* context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud. *See* In re Johnson, 167 U.S. 120, 126, 42 L. Ed. 103, 17 S. Ct. 735 (1896); Fitzgerald Construction Co. v. Fitzgerald, 137 U.S. 98, 34 L. Ed. 608, 11 S. Ct. 36 (1890). Similarly noted from the civil context, a federal court's criminal process is abused or degraded where it is executed against a defendant who has been brought into the territory of the United States by the methods alleged here. *Cf.* Commercial Mutual Accident Co. v. Davis, 213 U.S. 245, 53 L. Ed. 782, 29 S. Ct. 445 (1909); Fitzgerald Construction Co. v. Fitzgerald, *supra.* (We could not tolerate such an abuse without debasing "the processes of justice.")

Treaties in Force 359 (1973)("territory of a state is inviolable; it may not be the object, even temporarily, . . . of . . . measures of force taken by another state, directly or indirectly, on any grounds whatever. . . .") This concept was discussed at length in briefs filed with this Court in the matter of United States v. Alvarez-Machain, 112 S.Ct. 2188 (1992)

While on the surface, the Alvarez-Machain case may appear to be similar, it is not. In that much discussed case, the nations involved maintained an extradition treaty. It was that treaty, and the terms expressed, implied, and absent therefrom, that fundamentally framed the issues before this Court. Whether an abduction of a national from Mexico to the United States was in violation of the extradition treaty between those two nations was the core issue discussed by this Court.[4] In the instant matter, no extradition treaty exists between the United States and the Republic of Vanuatu. The key question before the Court now is one directly interpreting the concepts of due process, sovereign integrity, and the standards of conduct this pillar of our Federal Government desires to set for government agents.[5]

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[4]Unfortunately, the Brief for Mexico and others addressed the issue in terms of due process and international law, citing sources and precedents having limited relevance and only being collateral to the issue before the Court. See, *United States' Sanctioned Kidnappings Abroad: Can the United States Restore International Confidence In Its Extradition Treaties?*, 11 Ariz.J.Int'l & Comp. Law 181 (Spring, 1994)

[5]If the agents' abduction and kidnaping is condoned, the ultimate conclusion to this matter in the international arena is a breakdown in the standards and norms of civilized due process. If the U.S. Marshals' actions are viewed to be appropriate, no one should be surprised if the Republic of Vanuatu issues an indictment against the agents for kidnaping and sends its own Marshals to the United States to abduct and bring to justice these extrajurisdictional felons.

International kidnappings such as the one here violate the U.N. Charter, as was made clear to the world as a result of the Security Council debates following the illegal kidnapping in 1960 of Adolf Eichmann from Argentina by Israeli "volunteer groups." In response to a formal complaint filed by the U.N. representative from Argentina pursuant to Article 35 of the U.N. Charter, the Security Council, by eight votes to none (with two abstentions and one member -- Argentina -- not participating in the vote), adopted a resolution condemning the kidnapping and requesting "the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law. . . ." U.N. Doc. S/4349 (June 23, 1960), quoted in W. Friedmann, O. Lissitzyn & R. Pugh, International Law: Cases and Materials 497 (1969). The resolution merely recognized a long standing principle of international law that abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped. *See*, *The Vincenti Affair*, 1 Hackworth, Digest of International Law 624 (1920); The Cantu Case, 2 Hackworth 310 (1914); The Case of Blatt and Converse, 2 Hackworth 309 (1911).

In sum, agents of the United States violate due process when they abduct, kidnap, abscond, or in any way forcibly remove an individual wanted for criminal proceedings from a foreign, sovereign nation and bring that person back to the territorial and jurisdictional realm of our judiciary.

The second question addresses the recognition by the United States Government of the diplomatic credentials of an individual. This issue has been addressed by this Court in far fewer cases than the first, as the concept of diplomatic immunity is as endemic to international relations as the shield of sovereign immunity is to citizen-state relations.

Mr. Onapolis was a credentialed diplomat, engaged in diplomatic responsibilities for Cyprus. He traveled under a diplomatic passport as did his wife and young son. He was in the Republic of Vanuatu on such business when he was abducted. The responsible U.S. agents were aware of his credentials, yet they ignored them. In doing so, agents of the Federal government disrespected, disregarded, and denigrated hundreds of years of comity existing between sovereign nations.

In one of the first cases addressing diplomatic immunity by this Court, an interesting footnote is included by the court reporter. In Donath v. The Insurance Company of North America, 4 U.S. 463, 1 L. Ed. 910 (1806), the Court reviewed various matters of evidence as well as the opinion of the Judge of the Court of Vice-Admiralty (Judge Kelsall) who commented upon the general character and operation of diplomatic passports. This comment, mentioned in part, was sufficiently interesting by the Court Reporter to justify its insertion at length.

> This gentleman is a Spanish subject, but to exempt his property (of the value of eight or ten thousand dollars) from the usual consequence of capture, he had produced a paper, which has given rise to no small argument and discussion. It is a letter of licence from his majesty's ambassador with the American states, Mr. Liston, by which the commanders of vessels of war are requested to alloe Don Alvarez to pass, with his domestics, baggage, and effects. It is said, that this paper, from its language, not being mandatory, never was designed by Mr. Liston to be viewed as a safe conduct; that it is merely an expression of civility, a complimentary act, intended to procure to Don Alvarez polite treatment, and to protect himself, servants, baggage, and the customary viatica, or articles

necessary for his use during the voyage, ...

The safe conduct of ambassadors will not, I apprehend, be often the subject of consideration here; and still more rarely will it happen, that there will be any greater occasion to dispute, or deny, the privilege claimed, than there exists in the present. If, however, the right of ambassadors to grant licences, whereby enemy, or contraband goods, may be protected from capture, during their passage through the sovereign's dominions (which is the case more especially alluded to by Blackstone) (1) or even to the territories of the enemy, which is the case here, be admitted in its fullest extent; still it must be granted, that to insure proper respect to his act, attention should be paid to the forms prescribed or recommended by the writers on the law of nations.

As a member of the family of nations, the United States has obligated itself to the polite and proper treatment of those in the diplomatic corps. See, e.g., Vienna Convention on Diplomatic Relations, April 18, 1961; Restatement (Third) of Foreign Relations Law of the United States §§ 461 Commentary at 30 (Tent. Draft No. 4, 1983). The obvious result of a contrary policy is not a matter this nation, or any modern nation, would sustain. If our own diplomats were available for kidnapping and abduction to serve trial at The Hague, or, worse, at any one of a host of individual sovereign nations with whom we differ in foreign policy, who would indeed want to serve in our foreign service? How can the United States, in good conscience, enter into treaties respecting the inviolatability of diplomats if our courts will allow those under the protection of diplomatic passports to be abducted

from their bedrooms to stand to answer for criminal matters unrelated to national security?

Diplomatic immunity is a defense only a defendant can raise. *See*, United States v. Kostadinov, 572 F. Supp. 1547 (SDNY 1983) The Petitioners have repeatedly raised the matter, yet every lower tribunal has ignored this defense. Petitioners request that this Court adhere to the rule of law, recognize the pivotal position of international comity, and comprehend the ultimate result if Federal agents are allowed to ignore diplomatic credentials from other nations.

Coupled with the protections of diplomatic immunity, the Petitioners, as holders of national passports from a foreign sovereign, were protected by the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, an international treaty which secures rights for each signatory nation and its citizens by recognizing the corresponding rights of other nations and nationals. Article 36 of this compact, which under the Supremacy Clause of the Constitution represents the "supreme Law of the Land," establishes mechanisms by which consular officers may assist their citizens who have been arrested or detained in another nation. Despite the Petitioners entreaties in Australia and at the Customs Checkpoint in California for consular notification, the U.S. Marshals continued a pattern of gang-land control over their captives.

When an arrest is effectuated in violation of the law, the arrestee ought to be released.[6] The Vienna Convention, as a

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[6]See, Federal Republic of Germany v. United States of America (LaGrand Case)(June 2001), before the International Court of Justice, wherein the United States was found to have violated the Vienna

treaty ratified by the United States, represents legal requirements of our nation. Based solely on the violations under the Vienna Convention, the writ sought herein by the Petitioners ought to be granted.

Based on the fundamental elements of due process as expressed by this Court and the basic tenets of international law and comity, the Petitioners' abduction and subsequent incarceration should shock the constitutional conscience of this Court. A Writ of Habeas Corpus should be issued based on these facts alone. However, several of the underlying facts should be underscored to recognize the misconduct, animosity, and perversity of the United States Government.

The United States Marshals, in their zeal to capture the Petitioners, openly lied to the highest court of the Republic of Vanuatu, representing that the Petitioners were wanted as material witnesses rather than simply being release violators. Documents containing materially false allegations were provided to the Greek Government in efforts to effect extradition there.

The United States Marshals abducted Nikos Onapolis. Rather than delivering him to the Greek or Cypriote authorities at their respective embassies, these agents sought to traumatize the young boy instead.

The current facility housing the Petitioners will not allow them unmonitored phone calls with counsel.

The United States Marshals have presented no

Convention, and the Court ordered the United States to provide a guarantee of the non-repetition of such violations and retry the defendants.

Certificate of Extraditability, nor any documents indicating that the abduction of the Onapolis family was ever authorized by the Attorney General, or anyone with the authority to do so, despite requests by Petitioners and counsel.

The actions of the United States Marshals have undermined the credibility of the United States and endangered our own diplomats and citizens, wherever they may be located. The actions of the United States Marshals have further acted to de-stabilize an emerging sovereign nation. The Marshal's adherence to Ker-Frisbie, despite such factors as no extradition treaty, and the diplomatic status of the Petitioners, jeopardizes the security and safety of every American, who under other country's versions of Ker-Frisbie are subject to kidnaping and prosecution by foreign governments.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Habeas Corpus should be granted. In the alternative, the Petitioners seek the process of 28 U.S.C. §2243 in that an order directing the respondents to show cause why the writ should not be granted, which order shall be returned within three days. Once the order is returned, Petitioners request an immediate hearing as provided for in the statutes and required by the Vienna Convention.

Respectfully Submitted,

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